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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

Estate of DORIS M. EVANS, Deceased.	B206941 (Los Angeles County Super. Ct. No. KP011199)
DARLENE ONSTADT et al., Plaintiffs and Appellants, v. PATRICIA TENNIES et al., Defendants and Appellants.	

APPEALS from an order of the Superior Court for the County of Los Angeles. Steven D. Blades, Judge. Affirmed.

Allard, Shelton & O'Connor, Gary C. Wunderlin and Keith S. Walker for Plaintiffs and Appellants.

Law Offices of Douglas B. Spoors and Douglas B. Spoors for Defendants and Appellants.

SUMMARY

Renee Tennies-Mandel, a beneficiary and the trustee of her deceased grandmother's trust, petitioned the probate court for a determination that, before her death, her grandmother had agreed to transfer her residence, the principal asset of the trust, to her. Patricia Tennies, Renee's mother and also a beneficiary, testified in support of her daughter's petition. The petition was denied, and other beneficiaries of the trust brought a petition alleging that Renee and Patricia had violated the no contest clause of the trust, and should forfeit their gifts under the trust. The probate court found that Renee had violated the no contest clause, but Patricia had not. Both sides appeal. We affirm the trial court's order.

FACTUAL AND PROCEDURAL BACKGROUND

Doris M. Evans, who died on January 3, 2006, executed a living trust in 1992. The trust was amended three times, changing the successor trustee and in other minor ways, but the principal terms of the trust remained unchanged. At Evans's death, the trustee was to distribute $5,000 to each of her seven grandchildren, and the remainder of the trust estate was to be divided equally "between the Settlor's daughters, namely: Patricia Tennies, Charlene Evans and Darlene Perry [now Darlene Onstadt]." (Charlene and Darlene were actually Evans's step-daughters, but Evans raised them from the time they were young girls.) The trust declared that Evans had "set aside and holds in trust the property described in Attachment 'A' to this instrument." Attachment A listed real property located at 236 Cherrywood in West Covina (Evans's residence), along with several bank accounts and annuities. The residence was the most valuable item in the trust estate.

The trust also included a broad no contest clause, as follows:

> "In the event any beneficiary under this Trust shall singly, or in conjunction with any person or persons, contest in any court the validity of this Trust or the Settlor's Last Will or shall seek to obtain an adjudication in any proceeding in any court that this Trust or any of its provisions is void, or seek otherwise to void, nullify or set aside this Trust or any of its provisions, then the right of that person to take

> any interest given to him or her by the Trust shall be determined as if the person had predeceased with no issue the execution of this Declaration of Trust."

In October 2004, some 15 months prior to Evans's death, her granddaughter, Renee Tennies-Mandel (Patricia's daughter), along with her two children, moved into Evans's home. When Renee moved in, Evans was healthy and active, and took care of her own affairs in all respects. (Evans's daughters all lived in other states.) However, shortly after Renee moved in, Evans began to have medical problems: first a heart attack, about a month after Renee moved in, and then in March 2005, a fractured hip. Renee took increasing responsibility for assisting Evans, managing her care, taking her to appointments, paying her bills, and so on.

On June 17, 2005, Evans executed the third and final amendment to her trust (erroneously denominated the "First Amendment"), the principal effect of which was to appoint Renee to act as successor trustee upon Evans's death or resignation. (Patricia, Darlene, and Charlene were named as alternate successor trustees, in that order.) Evans also signed a power of attorney in favor of Renee on June 17, 2005.[1]

According to Renee, at some point prior to the June 17, 2005 trust amendment, Evans agreed to transfer her home to Renee, as consideration for Renee's living with Evans and committing to care for her until her death. Also according to Renee, Evans discussed the agreement to transfer her home to Renee with attorney Robyn Deppe, who prepared the June 17, 2005 trust amendment (and the original trust); Deppe suggested to Evans that "in lieu of including the gift of the Residence in the trust amendment that it

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[1] According to Darlene and Charlene, after Evans broke her hip in March 2005, her health continued to deteriorate. When Darlene visited in July 2005, Evans did not recognize her. Charlene, who telephoned her mother on an almost daily basis, stated that by October 2005, Evans was becoming increasingly confused. According to Patricia and Renee, however, Evans attended a family wedding at the end of September 2005 and recognized all of her grandchildren and great-grandchildren. Evans's death certificate indicated that Evans had dementia.

would be better to transfer the Residence to [Renee] prior to [Evans's] death to insure more advantageous property tax treatment." Deppe suggested that Evans first transfer the property to her daughter Patricia, who would then transfer it to Renee; this would ensure the property would not be reassessed for property tax purposes when title passed to Renee.

According to attorney Deppe, she never talked to Evans about the transfer of her home to Renee, but she did talk to Renee about it, in telephone calls Renee made to Deppe two or three months after the June 2005 trust amendment. Deppe told Renee she would be glad to meet with Evans and then prepare a deed, but Renee said she would do it herself. On October 5, 2005, however, Deppe did send Renee the blank forms "necessary to send with the Quitclaim Deeds"; Deppe's letter told Renee to "[f]irst go from grandmother to mother, then from mother to you," and that about a month's gap should be allowed between the two transactions. Deppe enclosed two blank copies each of (1) a "Preliminary Change of Ownership Report" and (2) a "Claim for Reassessment Exclusion for Transfer Between Parent and Child."

Some time in October 2005, Evans signed, before a notary, a "Claim for Reassessment Exclusion for Transfer Between Parent and Child" for the 236 Cherrywood property, which Renee prepared. Renee also prepared the "Preliminary Change of Ownership Report" forms (which require only the transferee's signature) and sent both sets of forms to her mother (Patricia), who signed them on November 3, 2005, and returned all of them to Renee. Renee then sent the first set of forms, reflecting a transfer from Evans to Patricia, to the county to be recorded. Because she did not include a deed with the forms, the forms could not be recorded and were eventually returned to her (some time in February 2006), but by this time Evans had died.

On June 8, 2006, Darlene filed a petition to remove Renee as trustee. Her petition alleged that she had received cash distributions from Renee, but had not received the

notification required by section 16061.7 of the Probate Code.[2] (That section requires a trustee to serve a notification, containing specified information, on the beneficiaries of a trust when the trust has become irrevocable due to the death of the settlor.) Darlene's petition alleged that Renee and her family had been occupying the settlor's residence without paying rent, and had not listed the property for sale, and that this constituted a breach of trust justifying her removal as trustee. Darlene also alleged that Patricia was insolvent and therefore disqualified to serve as successor trustee, and that she (Darlene) should be appointed trustee.

On August 22, 2006, Renee filed a "petition for determination of trust liability under contract," citing section 17200, subdivision (b). (Subdivision (a) of section 17200 permits a trustee or beneficiary to petition the court "concerning the internal affairs of the trust," and subdivision (b) defines such proceedings as including proceedings for the purpose of instructing the trustee (§ 17200, subd. (b)(6)), among many others.) Renee's petition alleged, as described above, that Evans had agreed to transfer her home to Renee as consideration for Renee's living with her and committing to care for her until her death; that Renee had completely performed her obligations under the contract; that Evans had attempted to do so but her performance was incomplete because of the failure to include quitclaim deeds along with the forms that were submitted to the county for recording; and as a result, Evans was in breach of the contract for failing to transfer title to Renee before her death. Renee "ask[ed] this Court to determine whether [Renee], in her capacity as trustee of the Trust, should satisfy what [Renee] believes is a valid, enforceable contractual liability of the Trust created by the Agreement to Transfer by transferring title to the Residence to [Renee] in furtherance of the contract." Renee sought a court order that (1) Evans's agreement to transfer the residence was valid and

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[2] All statutory references are to the Probate Code unless otherwise specified.

enforceable, and (2) Renee be directed, as trustee, to transfer title to the residence to herself individually.

Darlene's petition to remove Renee as trustee, and Renee's petition to determine the trust's liability under the alleged oral contract, were heard before Judge Dan Oki in September 2007. Patricia (as well as Renee) testified that it was Evans's intent to transfer the residence to Renee. Patricia was represented by the same attorney who represented Renee; Renee and Patricia filed a joint trial brief, asserting that Renee was entitled to the residence based on the alleged oral agreement.

After hearing testimony from Renee and Patricia, Judge Oki denied Renee's petition, finding there was no contract between Renee and Evans, and that in any event the contract alleged did not satisfy the requirements of the statute of frauds and was therefore unenforceable. During the trial, Renee resigned as trustee and, after testimony from attorney Deppe, Patricia, Darlene and Charlene, Patricia was appointed successor trustee. No appeal was taken from Judge Oki's order.

Darlene and Charlene (collectively, Onstadt) then filed a "petition for determination of persons entitled to distribution," asserting that both Renee and Patricia had violated the no contest clause of the trust and forfeited the gifts provided for them under the trust. They also filed a "petition for order instructing trustee to reimburse [Onstadt] for attorneys' fees and costs incurred for benefit of trust." This second petition sought reimbursement from the trust for the attorney fees and costs Onstadt incurred in the successful defense against Renee's effort to remove the residence from the trust estate (and also in the efforts to remove Renee as trustee).

After a hearing, the court issued two orders, both on January 28, 2008. The first order found that Renee's section 17200 petition was a contest within the meaning of the no contest clause of the trust, but that Patricia should not be disinherited under the no contest clause. The court's other order found that Onstadt was entitled under the "common fund" doctrine to attorney fees incurred in successfully preventing Renee from removing the residence from the trust. The court concluded Onstadt was "entitled to recover from Renee 1/3 of the $30,960 in attorney's fees and $2,301.01 sought, for a total

of $11,087." (The court later, on March 25, 2008, granted Onstadt's motion to clarify its order so that the $11,087 be ordered paid by the trustee of the trust, Patricia Tennies, from her one-third interest in the residue of the trust.) The court denied the attorney fees Onstadt sought for removing Renee as trustee, finding "no compelling evidence that Renee or Patricia were acting in bad faith."

On March 26, 2008, Onstadt filed a notice of appeal "from the Order entered on January 28, 2008, to the extent the Petition for Determination of Persons Entitled to Distribution was denied as to Respondent, Patricia Tennies." On April 14, 2008, Renee and Patricia filed a timely cross-appeal.

DISCUSSION

Onstadt contends the trial court should have found that Patricia's actions in attempting to cause the transfer of the residence to Renee, both before and after Evans's death, violated the no contest clause. In their cross-appeal, Renee and Patricia contend that the trial court erred (1) in finding that Renee violated the no contest clause, and (2) in ordering reimbursement of attorney fees to Onstadt for the successful defense against Renee's attempt to remove the residence from the trust. We conclude (1) we have no jurisdiction to consider the attorney fee issue, and (2) Renee's petition violated the no contest clause, but Patricia's actions did not.

1. The attorney fee issue.

We have no jurisdiction to consider Patricia's appeal from the trial court's order of January 28, 2008, awarding Onstadt attorney fees (the "reimbursement order"). While Onstadt filed a timely appeal from the court's order of the same date on the contest issues (the "no contest order"), and Renee and Patricia filed a timely cross-appeal on April 14, 2008, neither party filed a timely notice of appeal from the reimbursement order.

Under rule 8.104 of the California Rules of Court, a notice of appeal must be filed on or before the earliest of three dates, one of which is "60 days after the superior court clerk mails the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, showing the date either was mailed . . . " (Rule 8.104 (a)(1).) The court clerk mailed filed-stamped copies of both the

reimbursement order and the no contest order on January 28, 2008, so that an appeal from either order was required to be filed no later than March 28, 2008.[3] Onstadt's notice of appeal of March 26, 2008, expressly stated that the appeal was "from the Order entered on January 28, 2008, to the extent the [no contest petition] was denied as to Respondent, Patricia Tennies." Onstadt did not appeal from the reimbursement order. Renee and Patricia filed a timely cross-appeal on April 14, 2008. (Rule 8.108 extends the time "for any other party to appeal from the same judgment or order" until 20 days after the superior court clerk mails notification of the first appeal. (Cal. Rules of Court, rule 8.108(f)(1).)) But a cross-appeal, as the rule specifies, may only be filed "from the same judgment or order . . . ." (*Ibid.*) The only order Onstadt appealed was the no contest order, and consequently the only order from which Renee and Patricia could cross-appeal was the no contest order. Accordingly, because the time for filing an appeal is jurisdictional, and no timely appeal was filed from the reimbursement order, we cannot consider Patricia's claim that the trial court erred by ordering her to pay one-third of the fees Onstadt incurred in preventing the removal of the residence from the trust estate.

2. The no contest clause issues.

We conclude that Renee's petition violated the no contest clause in Evans's trust, but Patricia's actions "joining" and "support[ing]" Renee did not.

The general principles governing no contest clauses are described in *Burch v. George* (1994) 7 Cal.4th 246. A no contest clause in a will or trust "conditions a beneficiary's right to take the share provided to that beneficiary . . . upon the beneficiary's agreement to acquiesce to the terms of the instrument." (*Id.* at p. 254.) No contest clauses are valid in California "and are favored by the public policies of

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[3] The trial court clarified its reimbursement order on March 25, 2008. If the clarification could be said to constitute a substantive amendment to the order, the time for appeal would be extended to run from the date of the amendment. Even so, no appeal has ever been filed from the reimbursement order.

discouraging litigation and giving effect to the purposes expressed by the testator." (*Ibid.*) But a no contest clause is to be strictly construed because it results in a forfeiture. (*Ibid.*)

Whether there has been a contest within the meaning of a particular clause "'depends upon the circumstances of the particular case and the language used.'" (*Burch v. George, supra*, 7 Cal.4th at pp. 254-255.) The answer is to be gleaned from the purposes the settlor sought to attain by the provisions of the trust. So, even though a no contest clause is strictly construed to avoid forfeiture, "it is the [settlor's] intentions that control," and a court "'must not rewrite the [settlor's trust] in such a way as to immunize legal proceedings plainly intended to frustrate [the settlor's] unequivocally expressed intent from the reach of the no-contest clause.'" (*Id.* at p. 255.) Our review of the trial court's ruling is de novo. (*Id.* at p. 254 [the interpretation of a trust instrument presents a question of law for independent review, unless interpretation turns on the credibility of extrinsic evidence].)

a. The no contest clause: Renee

As the trial court concluded, Renee's petition directly challenged a provision of Evans's trust, which explicitly included the 236 Cherrywood property in the trust estate. Evans declared in Article I that she had "set aside and holds in trust the property described in Attachment 'A'" to the trust, and Evans's residence was the first item listed. There is thus no doubt as to Evans's "unequivocally expressed intent" when she executed the trust and its broad no contest clause in 1992: the house was part of the trust estate, the estate was to be divided equally among her daughters, and any action by a beneficiary seeking to set aside any of the trust's provisions would result in forfeiture of that beneficiary's gift. Because Renee's petition effectively sought to remove property from the trust estate, it was clearly an action that "frustrate[d] [the settlor's] unequivocally expressed intent" (*Burch v. George, supra*, 7 Cal.4th at p. 255), and therefore violated the no contest clause.

Our conclusion is consonant with the rationale expressed in *Burch v. George* and its progeny; indeed, in *Nairne v. Jessop-Humblet* (2002) 101 Cal.App.4th 1124 (*Nairne*),

the court found a violation of a no contest clause in circumstances indistinguishable from those in this case. We briefly review the precedents.

- In *Burch v. George*, the settlor declared that property subject to the trust was his separate property; the trust provided for division of the residue into six separate trusts, for his wife and other relatives, and used a very broad no contest clause (similar to the one in the Evans trust). Some of the property that was transferred to the trust, and that the trustor declared to be his separate property, included assets in which his wife had a community property interest, as well as pension plan death benefits to which she was entitled, as surviving spouse. After the trustor's death, his wife proposed to file a complaint seeking the return of her property from the trust estate, and sought a ruling as to whether she could do so without violating the no contest clause. The court posed the question this way: "[W]e must ascertain from these [trust] provisions whether Frank unequivocally intended that Marlene would forfeit the distribution provided for her under the trust instrument in the event that she decides to pursue her interests as a surviving spouse against the trust estate. If this intention plainly appears, then it must be concluded that Marlene's proposed actions would trigger the no contest clause." (*Burch, supra*, 7 Cal.4th at p. 256.) *Burch* found it "reasonably clear from the trust terms" that the trustor "intended to put his surviving spouse to an election between taking the distribution provided for her under the trust, or alternatively, renouncing that distribution and taking against the trust estate pursuant to her independent legal rights." (*Burch v. George, supra*, 7 Cal.4th at p. 257.) Indeed, the trustor's intentions were clear "even though the disputed assets were not listed in the trust instrument." (*Id.* at p. 258.)
- *Estate of Pittman* (1998) 63 Cal.App.4th 290 is to the same effect. There, the trustors (husband and wife, Val and Donna) executed a trust and listed trust property on schedules designating whether the asset was community property, Val's separate property, or Donna's separate property. As in this case, the trust contained a broad no contest clause, disqualifying any beneficiary who sought an

adjudication that any provision of the trust was void or sought "'otherwise to void, nullify, or set aside this trust or any of its provisions . . . .'" (*Id.* at p. 294.) After the deaths of Donna and Val, Donna's children filed a petition claiming that some property listed as Val's separate property was either community or quasi-community property, and sought an order modifying the trust exhibits to reflect the correct property designations. (*Id.* at pp. 294, 297.) Val's children sought enforcement of the no contest clause against Donna's children, and succeeded. The Court of Appeal pointed out that the no contest clause prohibited anyone "from *seeking* to merely *set aside any* of the *provisions* of the trust." (*Id.* at p. 298.) The court concluded that the trust "as a whole evinces a clear and decided intent on the part of Donna and Val Pittman that each piece of property in the trust estate pass in precisely the manner established in the trust." (*Id.* at p. 305.) The petition of Donna's children "sought to disrupt this meticulously drawn distribution scheme," sought "to thwart the trustors' clear intent by recharacterizing property expressly placed in the trust and specifically characterized" (*id.* at p. 303), and consequently "violated the purpose of the no contest provision . . . ." (*Id.* at p. 305.)

- Finally, *Nairne, supra,* 101 Cal.App.4th 1124, presents circumstances virtually identical to those in this case. In *Nairne,* a beneficiary (Nairne) claimed the trustee (Nairne's mother) and her deceased husband (the settlors of the trust) had orally agreed to give certain property to him (the "502 property"), and therefore the property should not have been included in the trust. (*Id.* at p. 1126.) The trust included property specified on an attached schedule, including the 502 property. Five years after the trust was executed, and two years after the husband's death, Nairne alleged that his mother and her husband had promised him that, if he moved into the property and helped with a business venture, the property would be deeded to him upon the husband's death. (*Id.* at p. 1127.) The court found that Nairne's complaint "directly attacks a provision of the trust, i.e., the inclusion and disposition of the 502 property," and if successful, "would frustrate [the settlors']

> intent that the 502 property be included in the trust . . . and that . . . the proceeds from the sale of the trust property … would be equally divided among [the mother's] children." (*Id.* at p. 1130.)

In short, the precedents are clear. Where the provisions of the trust instrument show the trustor's "unequivocally expressed intent," a challenge to the trust's provisions – even based on a legitimate claim of ownership to property in the trust – will result in the challenger's forfeiture of the gift provided in the trust. The provisions of Evans's trust are equally clear: she placed the house in the trust, provided the trust residue was to be divided equally among her daughters, and specified that any action to set aside a trust provision would result in forfeiture of the gifts provided by the trust.

Renee seeks to avoid the conclusion that ineluctably flows from *Burch* and *Nairne* with two arguments. First, she contends her petition was merely a request for instructions in her capacity as trustee, as permitted by section 17200. We reject that notion. The no contest clause in the trust instrument prohibits a beneficiary from seeking an adjudication "in any proceeding in any court" that any of the trust's provisions were void, or from otherwise seeking to void or set aside a trust provision, and Renee's petition sought in effect to void a provision of the trust that placed the residence in the trust estate. Moreover, Renee could have sought a ruling under the "safe harbor" provisions of the Probate Code (§ 21320), which permit a beneficiary to apply to the court for a determination of whether a particular motion or petition would be a contest within the terms of a no contest clause.[4] (§ 21320, subd. (a).) She failed to do so. Second, Renee contends that *Nairne* is distinguishable because the oral contract in that case was alleged

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[4] Section 21320 further provides that a no contest clause is not enforceable against a beneficiary to the extent such an application "is limited to the procedure and purpose described in subdivision (a)." (§ 21320, subd. (b).) A determination whether a proposed motion, petition or other act by a beneficiary violates a no contest clause "may not be made if a determination of the merits of the motion, petition, or other act by the beneficiary is required." (§ 21320, subd. (c).)

to have been made in the same year the trust was executed, whereas Evans created her trust in 1992, and the alleged agreement with Renee occurred many years later after dramatic changes in Doris Evans's circumstances. But the fact is that Evans could have, but did not, change the terms of her trust. And, every beneficiary who challenges a will or a trust presumably has some basis for undertaking the challenge; whether the challenge violates the no contest clause does not depend on the strength of the claim, but, as *Burch* instructs, on the purposes the settlor sought to attain by the provisions of her trust. (*Burch v. George, supra*, 7 Cal.4th at p. 255.) Evans's intentions were clear, and Renee's petition amounted to a contest causing her to forfeit her gift under the trust.

b. The no contest clause: Patricia

Onstadt contends that Patricia acted "in conjunction with" Renee within the meaning of the no contest clause, and that the trial court erred in concluding her actions did not violate the no contest clause. This is so, Onstadt says, because (1) before Evans's death, Patricia executed the documents she thought would transfer the property to her and then to Renee, and (2) Patricia appeared, without subpoena, at the trial on Renee's petition; submitted a joint trial brief with Renee; and testified at the trial and at an earlier deposition in support of Renee's position. As to the first point, nothing either Patricia or Renee did before Evans died could violate the no contest clause of the trust; the trust, its provisions, and the trust estate were all subject to change until the trust became irrevocable upon Evans's death. As to the second point, we simply do not accept the proposition (for which Onstadt cites no authority) that testimony in a legal proceeding initiated by others, whether under subpoena or not, suffices to constitute joining or supporting an effort to set aside a trust provision. Patricia could have been subpoenaed, and was in any event obliged to testify truthfully. Moreover, in the same proceeding, Darlene sought to remove Renee as trustee and to prevent Patricia's appointment as successor trustee, so Patricia was, in effect, required to participate in any event. Nor can we accord any significance to the fact that Patricia's attorney filed a single trial brief on behalf of both Renee and Patricia. In short, the circumstances of Patricia's participation in the proceeding initiated by Renee simply do not suffice to constitute acting "in

conjunction with" Renee to set aside a trust provision within the meaning of the no contest clause.

DISPOSITION

The probate court's order of January 28, 2008, ruling on Onstadt's petition for a determination of persons entitled to distribution under the Doris M. Evans trust, is affirmed. To the extent Patricia Tennies purports to appeal from the probate court's order of January 28, 2008, ruling on Onstadt's petition for an order instructing the trustee to reimburse Onstadt for attorney fees and costs, the appeal is dismissed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAUER, J.*

We concur:

FLIER, Acting P.J.

BIGELOW, J.

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.